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No. 95-1023

In the Supreme Court of the United States

OCTOBER TERM, 1995

TWENTY-THREE NINETEEN CREEKSIDE, INC., MICHAEL E. BALDIGO, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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Petitioner, a corporation with three shareholders, elected to be taxed as an "S corporation" under Subchapter S of the Internal Revenue Code, 26 U.S.C. 1361-1379. Petitioners challenge certain adjustments made by the Commissioner of Internal Revenue to its return for the taxable year ending June 30, 1984.

1. This is a companion case to *Alvis M. Rushton* v. *Commissioner of Internal Revenue*, No. 95-846. The petitioner in *Rushton* also sought review of the adjustments to the corporation's return for the taxable year ending June 30, 1985. For the reasons stated in the brief in opposition to the petition for a writ of

certiorari in the *Rushton* case, which was filed on December 28, 1995, the petition in this case should also be denied.*

2. Petitioner's further contention (Pet. 14-17) that Michael E. Baldigo was not the tax matters person of Creekside provides no basis for further review. Petitioner's contention is based on the fact that another individual, Alvis M. Rushton, held 100 percent of the shares in Creekside as of October 1, 1984 (Pet. 15).

Pursuant to Section 6231(a)(7)(B) and 6244 of the Internal Revenue Code, the tax matters person of a Subchapter S corporation is either the shareholder designated by the corporation or, in the absence of such a designation, the shareholder "having the largest profits interest in the [corporation] at the close of the taxable year involved" (26 U.S.C. 6231(a)(7)(B)). The term "taxable year" is defined as "the calendar year, or the fiscal year ending during such taxable year, upon the basis of which the taxable income is computed under subtitle A [Income Taxes]." 26 U.S.C. 7701(a)(23). The term "fiscal year" is defined as "an accounting period of 12 months ending on the last day of any month other than December." 26 U.S.C. 7701(a)(24).

It is undisputed that petitioner filed its tax return for 1984 on the basis of a fiscal year ending June 30, 1984, that it did not designate a tax matters person for that taxable year, and that Baldigo owned 72 percent of the shares in Creekside at all times during the taxable year (Pet. App. A6-A7, A43). The court of appeals correctly looked to the close of Creekside's fiscal year ending June 30, 1984, to determine the tax

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* We are providing a copy of the brief in opposition filed in No. 95-846 to petitioner.

matters person, and the court correctly identified Baldigo as the person having the largest profits interest on that date (Pet. App. A6-A9). Baldigo's subsequent sale of his entire interest to Rushton on October 1, 1984, occurred during Creekside's *1985* fiscal year (*id.* at A3, A7) and is therefore irrelevant to the determination of the tax matters person for the 1984 taxable year.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

DREW S. DAYS, III
Solicitor General

JANUARY 1996